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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1672

T. W. GUTHRIE, et al.,
Petitioners,
versus
ALABAMA BY-PRODUCTS COMPANY, et al.,
Respondents.

BRIEF

In Opposition to Petition for Certiorari

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Petitioners have failed to show any substantial reason for further review in this Court of the decision below.

Respondents will show that petitioners have (1) misinterpreted the basis of the holding below and (2) that the claimed conflicts between the decision below and other decisions do not exist.

PETITIONERS MISINTERPRET THE BASIS OF THE HOLDING BELOW

At the core of all of petitioners' arguments for a writ is the completely erroneous assertion that

> Both lower courts have thus held that Section 13 of the Refuse Act applies only to discharge of refuse that interferes with navigation and not to discharge that merely pollutes.
>
> (Petition, p. 5.)

This is **not** what the lower Courts held. To the contrary, both of the decisions* below assumed that the conduct complained of constituted violations of Section 13 of the Refuse Act (Appdx. to Petition, p. A-11).

The holding below is much narrower than petitioners assert. Without in any way denying the liability of respondents for criminal prosecution or for such equitable relief as may be sought by the **federal government**, the Courts below held that there is no **implied** right of action under the Refuse Act of 1899 in favor of **private citizens** to redress injury to their riparian **lands** resulting from water pollution in violation of that Act. This holding is summarized in the following excerpts from the opinion below:

> A careful review of the Rivers and Harbors Appropriation Act of 1899, its legislative history, its administrative interpretation and its judicial gloss has convinced this court that 33 U.S.C.A. §407 was not enacted for the purpose or with the effect of creating a federal cause of action to protect **riparian landowners** from the kinds of water pollution that

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* The Court of Appeals adopted the opinion of the District Court (Appdx. to Petition, pp. A-5-6).

have traditionally been dealt with under the law of nuisance. (Emphasis added.)

(Appdx. to Petition, p. A-13.)

All of this leads the Court to conclude that although Section 407 may create a federally protected right against deposit of refuse which injures navigation or anchorage, the injury of other **private** rights, **even from deposits in violation of Section 407,** does not give rise to a federal right of action nor does it supply a basis of federal jurisdiction in this case. (Emphasis added.)

(Appdx. to Petition, p. A-19.)

Thus, it is apparent that the Courts below did not even suggest that Section 13 of the Refuse Act applies only to discharges of refuse that interfere with navigation. Petitioner's assertion that the Courts below held to this effect is a serious misinterpretation of the decision this Court is being asked to review.

CLAIMED CONFLICTS WITH OTHER DECISIONS DO NOT EXIST

The holding of the Courts below is entirely consistent with the proposition that **any** deposit or discharge of refuse directly into navigable waters, or tributaries of navigable waters, is a violation of Section 13 of the Refuse Act of 1899, for which the **federal government** may prosecute the offender in a criminal action or seek appropriate civil relief. As we have pointed out, the Courts below assumed that such discharges did constitute violations of the Act (Appdx. to Petition, p. A-11) and expressly recognized the United States as the principal beneficiary for which the statute was enacted (Appdx. to Petition, p. A-14). As such, the United States is entitled to press for criminal sanctions as well as civil relief on account of such discharges.

Thus, it is clear that there is no conflict with decisions of this Court under the Refuse Act of 1899 such as **U. S. v. Standard Oil Co.**, 384 U.S. 224, and **Wyandotte Transp. Co. v. U. S.**, 389 U.S. 191, because both of these were actions by the United States, one a criminal prosecution and one for civil relief. For the same reason, there is no conflict with circuit court decisions under the Refuse Act of 1899, such as **U. S. v. Ballard Oil Co.**, 195 F.2d 369 (CA2); **U. S. v. Esso Standard Oil Co.**, 375 F.2d 621 (CA3), and **La Merced**, 84 F.2d 444 (CA9), because all of these were criminal prosecutions instituted by the United States.

None of the other decisions of this Court which petitioners suggest (Petition, pp. 6-7) are in conflict with the holding below even involve the Refuse Act of 1899. Thus, it is obvious that those decisions could not present any substantial conflict with the holding below.

All the other cases of which we are aware in which **private citizens** have sought to establish federal question

jurisdiction under the Refuse Act of 1899 to redress injury to **property rights** caused by water pollution have been decided the same way this case was decided by the Courts below. **H. Christiansen & Sons v. City of Duluth,** 154 F.2d 205 (8th Cir. 1946) (action for damage to plaintiff's dock caused by timbers washed into navigable waters from defendant's dock); **Chambers-Liberty Counties Nav. Dist. v. Parker Bros. & Co.,** 263 F. Supp. 602 (S.D. Tex. 1967) (action for trespass and conversion of shells removed from a jetty owned by plaintiff); **Lavagino v. Porto-Mix Concrete Inc.,** 330 F. Supp. 323 (D.C. Colo. 1971) (action by riparian land owners not claiming injury to any rights of navigation). In addition, **Hawkinson v. Blandin Paper Co.** (D.C. Minn., April 14, 1972, 4 ERC 1009), which was an action by riparian land owners for injury to rights of navigation and anchorage, distinguished the cases cited above where no such relief was sought.

CONCLUSION

The holding below is grounded upon a thorough analysis of the Act, its legislative history and its subsequent administrative and judicial interpretation, which led both the Courts below to the conclusion that riparian land owners, complaining only of injuries to their right to use and enjoy riparian lands, are not within the class of persons for whose benefit the Refuse Act of 1899 was enacted (Appdx. to Petition, p. A-13-19).

Petitioners acknowledge that they must show themselves to be within the class of persons for whose benefit the Refuse Act of 1899 was enacted in order to have the benefit of any such implied right of action (Petition, pp. 15-17). However, in their effort to show that they are within this class, petitioners cite only decisions which have recognized an implied right of action under the Refuse Act of 1899 in favor of private parties complaining of injuries to their **rights of navigation** (Petition, pp.

18-20). Petitioners in this case do not complain of such injuries (Petition, p. A-5).

All the cases cited by petitioners on this point were recognized by the Courts below and the holding below was harmonized with them (Cf. Petition, pp. 18-20 and Appdx. to Petition, p. A-15).

The lower federal courts that have confronted cases with essential facts similar to this one have reached the same conclusion—that there is no "federal question" jurisdiction in such cases. Consequently, the body of case law that is being developed in the lower federal courts has not heretofore been inconsistent and it is not rendered inconsistent by the decision in this case below.

Thus, the petition fails entirely to show any reason why further review in this Court of the harmonious decisions of the two Courts below would be justified.

Respectfully submitted

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